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Zinermon v. Burch: Putting Brackets Around the Parratt Doctrine

Edward Reidar Stabell III

Zinermon v. Burch: Putting Brackets Around the Parratt Doctrine

I. INTRODUCTION

In *Zinermon v. Burch*,[1] the Supreme Court addressed whether an adequate postdeprivation state tort law remedy provided all the process that was due to a federal claimant seeking redress for the alleged deprivation of his liberty by the wanton and reckless acts of officials charged by the State with providing predeprivation process.[2] The majority, in an opinion written by Justice Blackmun,[3] held that, when the erroneous deprivation was effected by the very officials responsible under state law for providing predeprivation process, the officials may not escape liability by claiming that it is impossible for the State to provide predeprivation process.[4]

Zinermon represents the Court's latest attempt to distinguish constitutional violations from state law torts. By focusing for the first time on the policymaking role of the government official effecting the deprivation, the decision provides a consistent approach to determining what acts are properly attributable to the government, and, at least in the procedural due process context, offers to reinvigorate substantive doctrinal development in actions against individual government officials.[5]

This Casenote begins with a brief survey of the key procedural due process doctrines involved.[6] It will then examine the underlying dispute,[7] detail the applicable state procedures,[8] analyze the case,[9] critique the decision,[10] and conclude with a brief summary.[11]

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1. 110 S. Ct. 975 (1990).
2. *Id.* at 979.
3. Justice Blackmun was joined by Justices Brennan, White, Marshall, and Stevens. *Id.* at 977.
4. *Id.* at 990.
5. *See infra* text accompanying notes 162-88.
6. *See infra* text accompanying notes 12-49.
7. *See infra* text accompanying notes 50-68.
8. *See infra* text accompanying notes 69-78.
9. *See infra* text accompanying notes 79-161.
10. *See infra* text accompanying notes 162-88.
11. *See infra* text accompanying notes 189-91.

II. BACKGROUND

A. *The Parratt/Hudson Doctrine*

In *Monroe v. Pape*,[12] the Supreme Court expanded the scope of 42 U.S.C. § 1983[13] ("Section 1983") by rejecting the argument that individuals deprived of constitutional rights by the unauthorized actions of state officers could not sue directly in federal court.[14] In upholding the availability of a federal remedy, the Court established three basic tenets to guide future Section 1983 litigation. First, in addition to discriminatory or otherwise unconstitutional conduct authorized by state law, conduct *unauthorized* by state law, but effected by agents carrying the badge of state authority, also satisfies the "under color of" state law requirement of Section 1983.[15] Second, the existence of an adequate state remedy is irrelevant to the availability of a federal remedy to a Section 1983 claimant.[16] And finally, Section 1983 itself demands no particular state of mind requirement as a condition of liability.[17] As a result, *Monroe* led to an explosion[18] of Section 1983 claims in federal courts and to a corresponding increase in attempts by the Court to limit its effects.[19]

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12. 365 U.S. 167 (1961).

13. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1988)). The amended section provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

14. 365 U.S. at 173-74.

15. *Id.* at 184.

16. *Id.* at 183. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

17. *Id.* at 187.

18. In 1961, at the time of the Court's decision in *Monroe*, the number of § 1983 claims filed in federal court numbered only 287. By 1985, however, the number had increased to 36,582, of which 19,000 were brought by prisoners. E. CHEMERINSKY, FEDERAL JURISDICTION 371 (1989) (citing T. EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIAL 86 (2d ed. 1987)).

19. The Court in *Monroe* also held that municipal governments may not be sued under Section 1983. 365 U.S. at 187. In Monell v. Department of Social Servs., 436 U.S. 658 (1978), however, the Court overruled *Monroe* on the question of municipal liability, but imposed a restrictive policy or custom requirement. *Id.* at 694-95. Rejecting the view that municipal corporations may be held liable for the actions of their agents under a *respondeat superior* theory, the Court in *Monell* imposed a causation requirement in interpreting the meaning of "person" under § 1983:

In *Parratt v. Taylor*,[20] the Court restricted the availability of a federal remedy to the Section 1983 claimant seeking redress for constitutional violations also actionable as state law torts.[21] Fearing that the fourteenth amendment would become a "font of tort law to be superimposed upon whatever systems may already be administered by the States,"[22] the Court attempted to distinguish constitutional violations from state law torts by defining situations in which it would be impracticable or impossible for a state to provide predeprivation process.[23] The Court, in an opinion written by Justice Rehnquist,[24] addressed whether a state

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> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. Although the Court in *Monell* was willing to bring municipalities within the ambit of § 1983, the Court has ruled that § 1983 does not abrogate eleventh amendment immunity for states against claimants seeking money damages in federal court, Quern v. Jordan, 440 U.S. 332, 345 (1979), and that states or state officials acting in their official capacities are not "persons" for § 1983 purposes. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989).

While restricting the scope of § 1983, the Supreme Court has also expanded individual immunities afforded government officials. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court discarded the subjective, good-faith component laid down in Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), and in Wood v. Strickland, 420 U.S. 308, 317-22 (1975), leaving the objective, clearly established law component. *Harlow*, 457 U.S. at 818. According to the Court in *Harlow*, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Id. Harlow* raises the specter that "an unscrupulous official [may] engage in malicious misuse of public authority whenever the relevant legal standards are objectively unclear." P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 912 (1989). Moreover, the Court in Anderson v. Creighton, 483 U.S. 635 (1987), offered further protection to the recalcitrant official by holding that good faith immunity is not lost unless a reasonable government official would know that the *specific* conduct was impermissible. *Id.* at 640.

20. 451 U.S. 527 (1981).

21. *Parratt* effectively relegated § 1983 claimants to state tort remedies if deprived of their property by the random and unauthorized negligent conduct of state officials. *Id.* at 543-44.

22. *Id.* at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

23. Justice Rehnquist stated:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the [f]ourteenth [a]mendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the [f]ourteenth [a]mendment cognizable under § 1983.

Id.

24. Justice Rehnquist was joined by Burger, C.J., Brennan, Stewart, White, Blackmun, and Stevens, JJ. *Id.* at 527-28.

postdeprivation tort remedy constituted all the process that was due to an inmate who sought redress for the negligent loss of hobby materials by prison officials.[25] Answering the question affirmatively, the Court quickly found that plaintiff's claim satisfied three of the four elements required to make a valid fourteenth amendment procedural due process claim: (1) the prison officials acted "under color of" state law;[26] (2) plaintiff's hobby kit represented a property interest protected under the Constitution;[27] and (3) plaintiff's "alleged loss, even though negligently caused, amounted to a deprivation."[28]

To satisfy the fourth element, Justice Rehnquist observed that the inquiry must focus on whether the deprivation was accomplished " 'without due process of law,' "[29] that is, without an opportunity to be heard " 'at a meaningful time and in a meaningful manner.' "[30] The Court, acknowledging that deprivations of property pursuant to established state procedure require a predeprivation hearing,[31] held that a different situation arises when the loss of an individual's property results from "random and unauthorized" negligent action of state officials.[32] In such cases, the Court concluded, it would be "not only impracticable, but impossible, to provide a meaningful hearing before the deprivation."[33] The State simply could not "predict precisely when the loss will occur."[34] Since the State could not have predicted when the negligent loss of plaintiff's hobby materials would occur, the Court held that postdeprivation state law tort remedies, sufficient in this case to compensate fully plaintiff's loss, satisfied the requirements of due process.[35]

Three years later, in *Hudson v. Palmer*,[36] the Court extended the rationale of *Parratt* to intentional deprivations of property by government officials.[37] As in *Parratt*, plaintiff in *Hudson* did not challenge the adequacy of state procedures. Instead, plaintiff sought redress in federal court for the intentional destruction of his property by state prison offi-

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25. *Id.* at 529.
26. *Id.* at 535-36.
27. *Id.* at 536.
28. *Id.* at 536-37.
29. *Id.* at 537 (quoting Baker v. McCollan, 443 U.S. 137, 145 (1979)).
30. *Id.* at 540 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
31. *Id.* at 538.
32. *Id.* at 541.
33. *Id.*
34. *Id.*
35. *Id.* at 543-44.
36. 468 U.S. 517 (1984).
37. The Court discerned "no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned." *Id.* at 533.

cials without due process of law.[38] Reaffirming *Parratt*, the Court in *Hudson* rejected the argument that "because an agent of the state who intends to deprive a person of his property '*can* provide predeprivation process, then as a matter of due process he must do so.' "[39] Finding the "controlling inquiry" to be whether the State, rather than the individual employee, can provide predeprivation process, the Court concluded that the State could no more predict its agents' "random and unauthorized intentional conduct" than it could anticipate similar negligent conduct.[40] Again, because the State was not in a position to *predict* the intentional actions of its officials, postdeprivation state law tort remedies provided all the process that was due plaintiff.[41]

The Supreme Court has placed two important limitations on the potential sweep of *Parratt*. First, in *Logan v. Zimmerman Brush Co.*,[42] the Court limited *Parratt* to instances of "random and unauthorized" actions by state officials.[43] Rejecting defendant's argument that the case should be dismissed pursuant to *Parratt*, the Court in *Logan* stated that "[u]nlike the complainant in *Parratt*, Logan is challenging not the [state commission's] error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."[44] Since the state system itself rather than the random and unauthorized conduct of state officials destroyed complainant's property interest, the Court concluded that predeprivation process was required.[45]

The second limitation that the Court has placed on *Parratt* concerns the state of mind requirement necessary to find a "deprivation" of due process. In two companion cases decided in 1986, *Daniels v. Williams*[46] and *Davidson v. Cannon*,[47] the Court essentially adopted the position of Justice Powell in his *Parratt* concurrence[48] by holding that negligent acts do not provide a basis for allegations of a deprivation of due process; a

38. *Id.* at 534.

39. *Id.* (quoting Brief for Respondent and Cross-Petitioner 8) (emphasis in original).

40. *Id.* at 533, 534.

41. *Id.* at 536.

42. 455 U.S. 422 (1982).

43. *Id.* at 435-36.

44. *Id.* at 436.

45. *Id.* at 434.

46. 474 U.S. 327 (1986). In *Daniels* a prisoner claimed that his liberty interest in being free from bodily harm had been denied without due process when he tripped on a pillow case that was negligently left on a staircase by a prison guard. *Id.* at 328.

47. 474 U.S. 344 (1986). In *Davidson* a prisoner alleged that prison officials had violated his due process rights by failing to protect him from attack by another prisoner after being informed of the threat. *Id.* at 345.

48. 451 U.S. at 546-54.

denial of due process requires some degree of fault greater than a simple lack of care by the offending official.[49]

B. The Underlying Dispute

On December 7, 1981, respondent Darrell Burch was found wandering along a Florida highway. Appearing "hurt and disoriented," Burch was taken to Apalachee Community Mental Health Services Hospital ("ACMHS"), a private mental health care facility designated by the State to receive the mentally ill. ACMHS's evaluation forms indicated that upon his arrival Burch was "hallucinating, confused, psychotic, and believed he was 'in heaven,' " and that "[h]is face and chest were bruised and bloodied."[50] Upon request, Burch signed forms giving consent to admission and treatment. During Burch's three day stay at ACMHS, the facility's staff diagnosed his condition as paranoid schizophrenia and administered psychotropic medication. On December 10, ACMHS transferred Burch to Florida State Hospital ("FSH"), a state-owned and operated hospital for the mentally ill, for longer term stabilization. Burch signed forms authorizing admission and treatment at FSH.[51]

While at FSH, Burch signed further forms requesting voluntary admission and treatment. In one form, entitled "Request for Voluntary Admission," Burch requested admission for " 'observation, diagnosis, care and treatment of [my] mental condition' " and agreed " 'to accept such treatment as may be prescribed . . . in accordance with the provisions of expressed and informed consent.' "[52] And in another form, entitled "Authorization for Treatment," Burch authorized FSH " 'to administer treatment, except electroconvulsive treatment'; that he had been informed of 'the purpose of the treatment; common side effects thereof; alternative treatment modalities; approximate length of care,' and of his power to revoke consent to treatment; and that he had read and fully understood the Authorization."[53]

A number of progress reports documented Burch's condition at the time of his admission. On December 10, Dr. Zinermon, a petitioner in this case, wrote that Burch was " 'refusing to cooperate,' would not answer questions, 'appear[ed] distressed and confused,' and 'related that medication ha[d] been helpful.' "[54] On December 11, a nursing assessment observed that "Burch was confused and unable to state the reason for his

49. 474 U.S. at 330-31; 474 U.S. at 347-48.
50. 110 S. Ct. at 979.
51. *Id.*
52. *Id.* at 980 (quoting Exhibit E-1 to Complaint).
53. *Id.* (quoting Exhibit E-5 to Complaint).
54. *Id.* (quoting Exhibit F-8 to Complaint).

hospitalization and still believed that '[t]his is heaven.' "[55] And on December 29, Dr. Zinermon reported "that, on admission, Burch had been 'disoriented, semi-mute, confused and bizarre in appearance and thought . . . not cooperative to the initial interview,' and 'extremely psychotic, appeared to be paranoid and hallucinating,' " and that Burch remained "disoriented, delusional, and psychotic."[56]

Appellee was released five months after his initial admission to ACMHS. During that period, appellant received no hearing concerning his hospitalization and treatment and did not remember signing any forms for voluntary admission. Appellant complained to the Florida Human Rights Advocacy Committee of the State's Department of Health and Rehabilitation Services, which investigated appellant's complaint and informed him by letter that he had signed a voluntary admission form and that there was documentation as to his condition upon admission.[57]

Respondent Burch then brought action under 42 U.S.C. § 1983 against ACMHS[58] and 11 other petitioners,[59] alleging that his voluntary admission violated state law and deprived him of his liberty without due process of the law.[60] The district court granted petitioner's Federal Rules of Civil Procedure 12(b)(6)[61] motion to dismiss, holding that, since the State could not anticipate or prevent the unauthorized deprivation of respondent's liberty interest by petitioners, Florida's postdeprivation tort remedies provided all the process that was due.[62]

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55. *Id.* (quoting Exhibits F-3 and F-4 to Complaint).

56. *Id.* (quoting Exhibit F-5 to Complaint).

57. *Id.*

58. ACMHS did not petition for certiorari. *Id.* at 979 n.4.

59. Petitioners included physicians, administrators, and staff members of FSH. *Id.* at 977.

60. *Id.* Burch specifically alleged:

> "Defendants . . . knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH . . . . Nonetheless, Defendants . . . seized Plaintiff and against Plaintiff's will confined and imprisoned him and subjected him to involuntary commitment and treatment for the period from December 10, 1981, to May 7, 1982. For said period of 149 days, Plaintiff was without the benefit of counsel and no hearing of any sort was held at which he could have challenged his involuntary confinement and treatment at FSH.
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> . . . Defendants . . . deprived Plaintiff of his liberty without due process of law in contravention of the [f]ourteenth [a]mendment . . . . Defendants acted with willful, wanton and reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law."

Id. at 981 (quoting App. to Pet. for Cert. 200).

61. FED. R. CIV. P. 12(b)(6).

62. 110 S. Ct. at 978.

The Eleventh Circuit Court of Appeals affirmed the dismissal,[63] but upon its own motion, ordered a rehearing en banc.[64] On rehearing, the court of appeals reversed the district court and remanded the case.[65] A plurality found that the State could have provided predeprivation remedies because petitioners had the authority and were in a position to give appellant a hearing by initiating involuntary placement procedures, yet refused to do so.[66] Five judges dissented on the ground that the State could not have possibly predicted the random and unauthorized conduct of petitioners.[67] The Supreme Court granted certiorari to resolve the conflict.[68]

C. *Florida's Statutory Scheme*

Florida statutory and administrative procedure provided for admission to a mental hospital in several different ways.[69] Under *involuntary* placement procedure, a person may be detained "if he meets the same criteria as for evaluation,[70] and if the facility administrator and two mental health professionals recommend involuntary placement."[71] Before admission, the patient is entitled to "notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination."[72] Upon review, a court determines "whether the patient is competent to consent to treatment [and, if not,] appoints a guardian advocate to make treatment decisions."[73] After six months, the patient is either released or, upon court order "stating the reasons therefor, summarizing the patient's treatment to that point, and submitting a plan for future treatment," is detained for continued treatment.[74]

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63. Burch v. Apalachee Community Mental Health Servs., Inc., 804 F.2d 1549 (1986); 110 S. Ct. at 978.

64. 812 F.2d 1339 (1987); 110 S. Ct. at 978.

65. 840 F.2d 797 (1988); 110 S. Ct. at 978.

66. 840 F.2d at 801-02; 110 S. Ct. at 978.

67. 840 F.2d at 810-14; 110 S. Ct. at 979.

68. Zinermon v. Burch, 109 S. Ct. 1337 (1989); 110 S. Ct. at 979.

69. The statutory scheme described by the Court represents that which existed in 1980-81, during the period in which respondent Burch was confined at Florida State Hospital. 110 S. Ct. at 981 n.10.

70. Under Florida procedure for court-ordered evaluation, a person could be detained up to five days, "if he is likely 'to injure himself or others' or if he is in 'need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and . . . such neglect or refusal poses a real and present threat of substantial harm to his well-being.' " *Id.* at 981 (quoting Fla. Stat. 394.463(2)(a) (1981)).

71. *Id.* at 981-82 (citing Fla. Stat. §§ 394.467(1) and (2) (1981)).

72. *Id.* at 982 (citing Fla. Stat. § 394.467(3) (1981)).

73. *Id.* (citing Fla. Stat. § 394.467(3)(a) (1981)).

74. *Id.* (citing Fla. Stat. §§ 394.467(3) and (4) (1981)).

Under *voluntary* placement procedure, any adult may be admitted upon " 'application by express and informed consent,' if he is 'found to show evidence of mental illness and to be suitable for treatment.' "[75] The applicable provisions define "express and informed consent" as " 'consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion.' "[76] A voluntary patient has a right to discharge at all times and must be so advised in writing at the time of his admission and every six months thereafter.[77] Within three days of his request for discharge, the patient must be released unless the facility administrator initiates involuntary placement proceedings.[78]

III. The Case

A. *The Majority Opinion*

Zinermon's Argument. Petitioners argued that dismissal pursuant to Rule 12(b)(6) should be affirmed because, under *Parratt* and *Hudson*, the State could not have provided predeprivation process before the random and unauthorized deprivation of Burch's liberty interest. Because the State was not in a position to provide a predeprivation hearing, petitioners contended that Florida's postdeprivation tort remedies provided all the process Burch was due.[79]

Burch's Argument. Burch, disavowing any facial challenge to Florida's admission procedure, claimed that petitioners violated state law by admitting him to FSH "voluntarily" when petitioners "knew or should have known" that he was incompetent to give informed consent. Burch asserted that petitioners' failure to initiate involuntary procedure denied him due process of law.[80] Burch also contended that *Parratt* and *Hudson* would not control because those cases only apply to property, rather than to liberty, deprivations.[81]

The Court's Opinion. Before addressing the parties' main contentions, the Court first delineated the scope of *Parratt* in due process analysis. The Court observed that *Monroe*, which generally discounted the rel-

75. *Id.* (quoting Fla. Stat. § 391.465(1)(a) (1981)).
76. *Id.* (quoting Fla. Stat. § 394.455(22) (1981)).
77. *Id.* (citing Fla. Stat. §§ 394.465(2)(a) and (3) (1981)).
78. *Id.* (citing Fla. Stat. § 394.465(2)(a) (1981)).
79. *Id.* at 977-78.
80. *Id.* at 977.
81. *Id.* at 986.

evance of overlapping state remedies to the existence of a Section 1983 cause of action,[82] applied in two of the three types of claims that may be brought against state officials under the due process clause of the fourteenth amendment.[83] In Section 1983 claims involving substantive due process violations or infringements of specific rights secured by the Bill of Rights and incorporated through the due process clause, the Court noted that the existence of adequate state remedies is generally irrelevant.[84] But in cases involving the third type of protection recognized under the due process clause, the guarantee of fair procedure, the "existence of state remedies *is* relevant"[85] because the constitutional violation "is not complete unless and until the State fails to provide due process."[86] To determine whether process provided by the State was constitutionally adequate, the "inquiry would examine the procedural safeguards built into the statutory or administrative procedure . . . and any remedies for erroneous deprivations provided by statute or tort law."[87]

The Court next observed that *Parratt* represented not an exception to, but rather a special application of, the *Mathews v. Eldridge*[88] balancing test[89] for determining what procedural safeguards are constitutionally required.[90] *Mathews* usually requires "some kind of a hearing *before* the State deprives a person of liberty or property."[91] But in cases to which *Parratt* applies, the second variable in the *Mathews* equation—the value of predeprivation safeguards—becomes so "negligible in preventing the deprivation at issue"[92] that "no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process."[93]

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82. *Id.* at 982.
83. *Id.* at 983.
84. *Id.*
85. *Id.* (emphasis in original).
86. *Id.*
87. *Id.*
88. 424 U.S. 319 (1976).
89. The *Mathews* test requires the balancing of several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.
90. 110 S. Ct. at 985.
91. *Id.* at 984 (emphasis in original).
92. *Id.* at 985.
93. *Id.* (citations omitted).

As a threshold question, the Court addressed and rejected Burch's contention that *Parratt* and *Hudson* cannot apply to liberty deprivations.[94] Relying on *Lynch v. Household Finance Co.*[95] and *Wolff v. McDonell*,[96] the Court found no support in prior precedent for a "categorical distinction" between liberty and property deprivations.[97] Moreover, the Court observed that the majority in *Parratt* acknowledged that "its analysis was 'quite consistent with the approach taken' in *Ingraham v. Wright*,[98] a liberty interest case."[99] According to the Court, *Ingraham* stood for the proposition that "in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest," due process requires only postdeprivation remedies.[100] Noting that *Parratt* and *Hudson* emphasized the "State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake,"[101] the Court concluded that the existence of a liberty interest did not "automatically preclude application of the *Parratt* rule."[102]

The Court then proceeded to examine petitioners' primary contentions that *Parratt* and *Hudson* require dismissal of Burch's claim.[103] Employing the *Mathews* risk analysis,[104] the Court addressed the question "whether predeprivation procedural safeguards could address the risk of deprivations of the kind Burch alleges."[105] According to the Court, Florida's voluntary placement procedure risked confining persons, such as Burch, who are apparently willing to sign forms authorizing admission and treatment, but are mentally incompetent to give the required "express and informed consent."[106] The Court noted that such persons were in danger of being confined indefinitely without benefit of "the voluntary

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94. *Id.* at 986-87.

95. 405 U.S. 538 (1972). According to the Court, *Lynch* recognized that " 'the dichotomy between personal liberties and property rights is a false one.' " 110 S. Ct. at 986 (quoting *Lynch*, 405 U.S. at 552).

96. 418 U.S. 539 (1974). In generally requiring a hearing before the final deprivation of property, *Wolff*, noted the Court, also stated that " 'a person's liberty interest is equally protected.' " 110 S. Ct. at 986 (quoting *Wolff*, 418 U.S. at 557-58).

97. 110 S. Ct. at 986.

98. 430 U.S. 651 (1977).

99. 110 U.S. at 986-87 (quoting Parratt v. Taylor, 451 U.S. 527, 542 (1981)) (citation omitted).

100. *Id.* at 987 (construing *Ingraham*, 430 U.S. at 682).

101. *Id.*

102. *Id.*

103. *Id.*

104. *See supra* text accompanying notes 88-93.

105. 110 S. Ct. at 987.

106. *Id.* Florida required that an applicant for voluntary admission make a "knowing and willful decision without any element of force, fraud, deceit, duress, or other form of

patient's statutory right to request discharge" or "the procedural safeguards of the involuntary placement process, a process designed to protect persons incapable of looking after their own interests."[107]

The Court next determined the value of predeprivation procedural safeguards "in guarding against the kind of deprivation Burch allegedly suffered."[108] Petitioners asserted that predeprivation procedures could have no value because a state cannot predict the random and unauthorized admission errors of its officials.[109] Rejecting petitioners' contention,[110] the Court concluded that *Parratt* and *Hudson* do not apply for three reasons.

First, the Court found that the deprivation of Burch's liberty interest was not "unpredictable."[111] Florida's voluntary admission procedure,[112] observed the Court, specifies that "only a person competent to give informed consent may be admitted,"[113] yet provides no way of determining whether a patient is competent.[114] The very nature of mental illness, however, makes it foreseeable that "a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their willingness to be admitted at face value and not initiate involuntary placement procedures."[115] Unlike *Parratt* and *Hudson*, continued the Court, "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process—when a patient is given admission forms to sign."[116]

Second, the Court concluded that predeprivation process was not "impossible."[117] In *Parratt* and *Hudson*, asserted the Court, the very nature of the deprivation made it absurd to suggest that the State could provide a hearing to determine whether a prison official should wrongfully engage in negligent or intentional conduct.[118] In contrast, the Court found noth-

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constraint or coercion." *Id.* at 982 (quoting Fla. Stat. § 394.455(22) (1981)). *See supra* text accompanying notes 75-78.

107. 110 S. Ct. at 987. Florida's involuntary placement procedure required the appointment of a guardian advocate as well as "notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination." *Id.* at 982 (quoting Fla. Stat. §§ 394.467(3) and (4) (1981)). *See supra* text accompanying notes 70-74.

108. 110 S. Ct. at 988.

109. *Id.*

110. *Id.*

111. *Id.* at 989.

112. *See supra* text accompanying notes 75-78.

113. 110 S. Ct. at 989.

114. *Id.* at 987, 989.

115. *Id.* at 989.

116. *Id.*

117. *Id.*

118. *Id.*

ing absurd in suggesting that the State could have prevented the deprivation of Burch's liberty "had the State limited and guided petitioners' power to admit patients."[119] Petitioners "knew or should have known" that Burch was incapable of informed consent, yet admitted Burch "voluntarily" in "willful, wanton, and reckless disregard" of their duty to implement proper procedures.[120]

Finally, the Court reasoned that petitioners' conduct was not " 'unauthorized' in the sense the term [was] used in *Parratt* and *Hudson*."[121] Unlike those cases, in *Zinermon*, the State "delegated to [petitioners] the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement."[122] Burch, observed the Court, sought not only "to blame the State for misconduct of its employees," but also "to hold [petitioners] accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue."[123] Thus, even though the deprivation here was not sanctioned by state law, the Court found petitioners potentially liable for the abuse of their state-delegated authority to deprive Burch of his liberty.[124]

In conclusion, the Court reiterated that "petitioners cannot escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy."[125] Burch's complaint, asserted the Court, alleged the deprivation of a substantial liberty interest, without valid consent or the protections of the involuntary placement process, by the very officials charged with state authority to ensure that proper procedural safeguards were implemented.[126] The very nature of mental illness, continued the Court, made it foreseeable that the deprivation would occur at a predictable point in the admissions process.[127] *Parratt* and *Hudson*, therefore, did not require dismissal of Burch's complaint in favor of postdeprivation tort remedies.[128]

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119. *Id.*
120. *Id.*
121. *Id.* at 990.
122. *Id.*
123. *Id.* at 989.
124. *Id.* at 990.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

B. The Dissent

Justice O'Connor, with whom Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined, agreed that Burch alleged a "serious deprivation" of liberty, but argued that *Parratt* and *Hudson* required dismissal.[129] According to Justice O'Connor, "[o]nly by disregarding the gist of Burch's complaint—that state actors' wanton and unauthorized departure from established practice worked the deprivation—and by transforming the allegations into a challenge to the adequacy of Florida's admissions procedures [could] the Court attempt to distinguish this case from *Parratt* and *Hudson*."[130]

Justice O'Connor began by asserting that Burch's complaint alleged only that petitioners' unauthorized departure from Florida's established procedures caused the deprivation of his liberty.[131] According to Justice O'Connor, Burch challenged neither the adequacy of Florida's established admission procedures nor a "widespread practice" of subverting those procedures.[132] "Burch instead claim[ed] that . . . petitioners wrongfully employed the voluntary admission process deliberately or recklessly to deny him the hearing that Florida requires state actors to provide, through the involuntary admission process, to one in his position."[133] From these allegations, Justice O'Connor concluded that, in absence of a challenge to Florida's admission procedures, petitioners' conduct was "random and unauthorized" within the meaning of *Parratt* and *Hudson*.[134] The Court, therefore, erred in refusing to apply those cases.

First, contended Justice O'Connor, Florida could not predict the random and unauthorized deprivation of Burch's liberty interest.[135] Reminding the Court that " '[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process,' "[136] Justice O'Connor argued that the wanton and reckless nature of the deprivation indicated that the State could not anticipate the wrongful deprivation.[137] The Court's assertion that the State could foresee " 'that a person requesting treatment for mental illness might be incapable of informed consent' "[138] was only "relevant in considering the general adequacy of Flor-

129. *Id.*
130. *Id.* at 990-91.
131. *Id.* at 991.
132. *Id.*
133. *Id.*
134. *Id.* at 991.
135. *Id.* at 992.
136. *Id.* at 991-92 (quoting Hudson v. Palmer, 468 U.S. 517, 534 (1984)).
137. *Id.* at 992.
138. *Id.* (quoting majority opinion at 989).

ida's voluntary admission procedures . . . ."[139] Although continued departures might be predictable, Florida " 'cannot predict precisely when the loss will occur' " and, therefore, need only provide adequate postdeprivation remedies for wrongful departures.[140]

Second, Justice O'Connor asserted that the unauthorized and random nature of the deprivation made additional predeprivation procedures "impracticable."[141] Added safeguards vaguely suggested by the Court would not reduce the risk of erroneous deprivation.[142] State actors determined to subvert procedural safeguards, noted Justice O'Connor, would do so despite additional procedures.[143] Moreover, even if additional procedures would provide *some* benefit, "*Parratt* and *Hudson* extend beyond circumstances in which procedural safeguards would have had 'negligible' value."[144] In both those cases, additional procedures might have provided a marginal benefit, but that possibility did not alter the analysis because the State still could not have predicted precisely the type of deprivation involved.[145]

Finally, Justice O'Connor found the Court's attempt to distinguish *Parratt* and *Hudson* on the basis of broad delegated power unconvincing, unprecedented, and unsupported by the record.[146] According to Justice O'Connor, "[e]very command to act imparts the duty to exercise discretion in accord with the command and affords the opportunity to abuse that discretion."[147] Petitioners had no greater discretion to subvert established procedures than did the prison official in *Parratt* or the prison guard in *Hudson*.[148] The Court's delegation argument, continued Justice O'Connor, threatens to blur the sharp distinction drawn between established state procedure and random and unauthorized conduct,[149] while ignoring the unauthorized nature of petitioners' actions.[150] The delegation issue, asserted Justice O'Connor, is "bound with and more properly analyzed as an aspect of the adequacy of the State's procedural safeguards, yet the Court claims Burch did not present this issue and purports not to

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139. *Id.*
140. *Id.* (quoting Parratt v. Taylor, 451 U.S. 527, 541 (1981)).
141. *Id.* at 993.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 993-94 (construing Hudson v. Palmer, 468 U.S. 517, 533 (1984); Parratt v. Taylor, 451 U.S. 527, 541 (1981)).
146. *Id.* at 994-95.
147. *Id.* at 994.
148. *Id.*
149. *Id.* (citing *Hudson*, 468 U.S. at 532; Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982); and *Parratt*, 451 U.S. at 541).
150. *Id.*

decide it."[151] Only by addressing an issue not raised in this case could the Court reach its conclusion.[152]

Justice O'Connor then observed that the Court's delegation rationale threatens to subvert the "established and delicately related" doctrines in *Mathews* and *Parratt*.[153] Until the Court's opinion, asserted Justice O'Connor, those doctrines worked in tandem.[154] But the Court now creates a "vast terra incognita" of procedural safeguards between the "border clearly dividing the duties required by *Mathews* from those required by *Parratt*."[155] Instead of *Mathews* determining the State's obligation to provide predeprivation safeguards, Justice O'Connor contended that the Court now decides that the "State must have fully circumscribed and guided officials' exercise of power and provided additional safeguards, without regard to their efficacy or the nature of the governmental interests."[156] Moreover, "the burden is apparently on certain state actors to demonstrate that the State sufficiently constrained their powers."[157] The *Parratt* doctrine, which covers "wrongful departures from unchallenged and established state procedure,"[158] is also "displaced when the State delegates certain types of duties in certain inappropriate ways."[159] As a result, the dissent concluded that the Court creates a vast "no-man's land" with no apparent boundaries[160] and threatens to " 'make of the [f]ourteenth [a]mendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' "[161]

IV. ANALYSIS

Zinermon represents the Court's latest attempt to draw a line between due process deprivations and common law torts by distinguishing the governments' acts from its employees' acts. In dissent, Justice O'Connor contended that the Court's delegation argument unjustifiably blurs the distinction between established state procedures and random and

151. *Id.*
152. *Id.*
153. *Id.* at 995.
154. *Id.*
155. *Id.* at 996.
156. *Id.*
157. *Id.* at 995.
158. *Id.* at 995.
159. *Id.* at 996.
160. *Id.*
161. *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

unauthorized departures from those procedures.[162] According to Justice O'Connor, the Court's position could be upheld only if Burch's allegations were transformed into a challenge to the adequacy of Florida's admission procedures.[163] The Court, acknowledging that Burch disavowed any such challenge, established a third position between deprivations caused by established state procedure, requiring predeprivation process, and those attributable to the random and unauthorized actions by state officials, necessitating an adequate postdeprivation state tort remedy.[164] Although almost certainly creating a "doctrinal innovation,"[165] the Court's treatment of Burch's allegations nevertheless represents a useful addition, rather than a disruption, to due process analysis.

First, the Court provided much needed clarification concerning the scope of *Parratt*. Expanding that scope, the Court removed any artificial distinctions between deprivations of liberty and property.[166] The rationale of *Parratt*, concluded the Court, did not preclude its application to instances of wrongful deprivations of liberty.[167] Concurrently, the Court limited the potential sweep of *Parratt* to procedural due process violations.[168] *Parratt*, observed the Court, represented not an exception, but a special application of the *Mathews* balancing test to circumstances in which the second variable in the equation—the value of predeprivation safeguards—is so negligible that no amount of private interest can justify requiring the State to provide predeprivation process.[169] Rather than upsetting due process analysis, as Justice O'Connor suggests,[170] the Court implicitly places *Parratt* into a well-developed line of procedural due process cases employing the *Mathews* risk analysis.[171] *Zinermon*, therefore, effectively ends any threat of *Parratt* overruling *Monroe's* "no-exhaustion" requirement[172] in two of the three types of due process analyses[173]

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162. *Id.* at 994 (citing Hudson v. Palmer, 468 U.S. 517, 532 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982); and Parratt v. Taylor, 451 U.S. 527, 541 (1981)) (O'Connor, J., dissenting).

163. *Id.* at 990-91 (O'Connor, J., dissenting).

164. *Id.* at 989. The Court noted that "Burch's suit is neither an action challenging the facial adequacy of a [s]tate's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws." *Id.*

165. *Id.* at 996. Justice O'Connor suggested that, instead of creating a novel cause of action, the Court could have avoided disrupting established law by applying *Mathews* to the adequacy of additional procedures. *Id.* (O'Connor, J., dissenting).

166. *See supra* text accompanying notes 94-102.

167. 110 S. Ct. at 986-87.

168. *See supra* text accompanying notes 89-93.

169. 110 S. Ct. at 985.

170. *Id.* at 994 (O'Connor, J., dissenting). *See supra* text accompanying notes 153-61.

171. 110 S. Ct. at 984-85. *See supra* text accompanying notes 88-93.

172. Monroe v. Pape, 365 U.S. 167, 184 (1961). *See supra* text accompanying note 16.

173. *See supra* text accompanying notes 82-87.

and further clarifies the position of *Parratt* in the third procedural category.[174]

Second, by delineating the scope of the term "unauthorized," the Court's decision further limits *Parratt* to deprivations caused by lower level, non policymaking officials. Under *Parratt* and *Hudson*, the State could not be expected to provide predeprivation process because of the random and unauthorized nature of the deprivation.[175] But in the case of Burch's liberty deprivation, the Court observed that Florida "delegated to [petitioners] the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement."[176] Petitioners, said the Court, were "the *only* persons in a position to take notice of any misuse of the voluntary admission process, and to ensure that the proper procedure [was] followed."[177] Despite Justice O'Connor's argument to the contrary,[178] petitioners' discretion greatly exceeded that of the prison official in *Parratt* and the guard in *Hudson*. In neither of those cases did the officials working the deprivation also have the authority to provide predeprivation process.[179] But because Burch was deprived of his liberty by the same officials responsible under state law for providing predeprivation process, petitioners' failure to initiate voluntary admissions procedure was "authorized" as final state policy, although contrary to established state procedure.

Third, the Court's analysis does not necessarily disrupt the established state procedure doctrine announced in *Logan*. In *Logan*, the Court clearly found that *Parratt* was inapplicable when the deprivation resulted from the operation of formally promulgated state law or procedure.[180] But the Court did not clarify whether established state procedure included official policy or custom.[181] At least implicitly, Justice O'Connor recognized such an extension by arguing for dismissal pursuant to *Parratt* since Burch challenged neither the adequacy of Florida's admissions procedures nor alleged the existence of "any widespread practice of subverting the State's procedural safeguards."[182] Moreover, in attacking the Court's dele-

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174. *See supra* text accompanying notes 88-93.

175. 110 S. Ct. at 989 (construing Hudson v. Palmer, 468 U.S. 517, 533-34 (1984); Parratt v. Taylor, 451 U.S. 527, 541 (1981)).

176. *Id.* at 990. *See supra* text accompanying notes 146-52.

177. 110 S. Ct. at 988 (emphasis in original).

178. *Id.* at 994. Justice O'Connor contended that petitioners' discretion was no greater than the prison official in *Parratt* or the prison guard in *Hudson*. *Id.* (O'Connor, J., dissenting).

179. *Id.* at 989.

180. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982).

181. *Id.*

182. 110 S. Ct. at 991.

gation argument, Justice O'Connor implied the possibility of an extension of *Logan* to instances of deprivations caused by the single acts of officials charged by the State with providing predeprivation process.[183] Justice O'Connor and the Court, however, parted company on the question whether such single acts constitute a separate category of deprivations requiring predeprivation process. Unlike Justice O'Connor, the Court would attribute deprivations occasioned by the single acts of officials responsible under state law for establishing final government policy to the State, independent of the established state procedure exception.[184]

Finally, the Court's separate grounds for decision do not necessarily blur the distinction between deprivations caused by established state procedure and those visited pursuant to random and unauthorized acts. To distinguish deprivations occasioned by established state procedure from those caused by the single acts of final decisionmakers, the Court already has a body of case law to supply the necessary causation. In *Monell v. Department of Social Servs.*,[185] the Court held that municipal liability attaches under Section 1983 when a constitutional deprivation is caused by the execution of a "policy or custom."[186] The policy or custom requirement of *Monell* might determine causation under *Logan's* established state procedure exception. Moreover, in *Pembaur v. City of Cincinnati*,[187] the Court concluded that a municipality is liable when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[188] *Pembaur*'s causation analysis might then be relied upon to determine whether the official who caused the deprivation is responsible for establishing final policy and, consequently, whether the State was in a position to provide predeprivation process. *Parratt* would control all other situations in which unauthorized deprivations were nearly impossible to predict.

V. CONCLUSION

In *Zinermon*, the Court held that, when a deprivation of a constitutionally protected interest is effected by the same official responsible under state law with providing predeprivation process, the State must provide that process and cannot claim that it was impossible to do so.[189] By recog-

183. *Id.* at 994 (O'Connor, J., dissenting). *See supra* text accompanying notes 146-52.
184. 110 S. Ct. at 988-90.
185. 436 U.S. 658 (1978).
186. *Id.* at 694.
187. 475 U.S. 469 (1986).
188. *Id.* at 483-84.
189. 110 S. Ct. at 990.

nizing that deprivations occasioned by single acts of final decisionmakers are attributable to the State, the Court justifiably limits *Parratt* to instances in which the State could not have possibly provided predeprivation process. Furthermore, by avoiding analysis under *Logan*, the Court seemingly relegates the established state procedure exception to deprivations effected by official policy or custom, even if that policy or custom is contrary to state law. Although not perfectly analogous, the Court's interpretation of official policy in *Zinermon* provides a consistent approach to the concept of causation in the *Monell* and *Parratt* line of cases. As a result, *Zinermon* offers, at least in the procedural due process context, to facilitate further substantive doctrinal development in actions against government officials.[190]

EDWARD REIDAR STABELL, III

190. Several commentators have raised the spector that *Zinermon's* law-evolving potential may be, at best, chimerical. First, although the Court in *Zinermon* held that Burch's complaint was sufficient to state a claim under § 1983 for violation of his right to procedural due process, 110 S. Ct. at 990, there remains the possibility that Burch's complaint will fall victim upon remand to *Harlow* and *Andersons'* "clearly established law" requirement for qualified immunity. Second, even if the new process right recognized in *Zinermon* is thereafter considered sufficiently established under the legal arm of the *Anderson* test, future defendant's might still successfully assert the defense by arguing that, under the factual arm of the test, a reasonable official could not have known that the *specific* conduct was impermissible. Finally, if the qualified immunity defense even then is overcome, the *Zinermon* decision limits the new right to procedural due process claims. H. Lewis & T. Blumoff, *Reshaping the Dynamics of Section 1983* (unpublished manuscript).